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Nos. 89-56, 89-79, and 89-101

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, ET AL., PETITIONERS

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the rule of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), precludes proof that a direct purchaser has passed on the full amount of an overcharge caused by a third party's antitrust violation to its customers.

2. Whether the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), confers standing on a direct purchaser who has passed on the full amount of any unlawful overcharge to its customers.

3. Whether a direct purchaser who has passed on the full amount of an overcharge to its customers has standing under Article III.

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No. 89-79

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Oakland County and Macomb County brought this action seeking damages for alleged over-

charges by petitioner City of Detroit arising out of alleged violations of the antitrust laws and of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq*. (RICO). In the Detroit, Michigan area, municipal sewer systems connect to interceptor sewers built and operated by counties. The counties' lines in turn connect to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and disposes of the resulting sludge.

Relationships among the municipalities, the counties, and the City of Detroit are governed by contracts entered into pursuant to state law. Under those contracts, Detroit bills the counties for services provided.[1] The counties are responsible for paying these bills, but they in turn bill the municipalities for services based on their own costs, which include Detroit's charges, costs incurred in building, operating, and maintaining the county system, and an allowance for reserves. Costs are allocated to the municipalities under a number of formulas, some involving estimates of usage. The municipalities in turn bill their residential and commercial customers in a variety of ways, allocating the county's charges and adding enough to cover their own local expenses. Municipal payments to the counties are segregated in county "enterprise funds," through which the county systems are operated. The counties draw their payments to Detroit from the enterprise funds. Pet. 3, 4.

At a time when petitioner Coleman A. Young, the Mayor of Detroit, was acting as administrator of the wastewater treatment plant under court order, Detroit entered into various sludge hauling and disposal contracts. These transactions eventually led to the convictions of various in-

[1] Like the court below, we describe facts largely in relation to respondent Oakland County because respondent Macomb County provided fewer facts. See 89-56 Pet. App. 5a-6a.

dividuals and entities in the sludge hauling business for RICO, Hobbs Act, and mail fraud violations. Following the criminal investigation, the respondent counties brought a civil action grounded on the same transactions. Respondents sought treble damages under the Clayton Act, 15 U.S.C. 15 and RICO, alleging that Detroit's bills to them included unlawfully inflated costs.

2. The district court, on a slender record,[2] dismissed for lack of standing. The defendants contended that the counties had not been injured because they had passed on the overcharge to the municipalities. Recognizing that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had "severely restricted" the pass-on defense, the court nevertheless read a Sixth Circuit decision, *Obron* v. *Union Camp Corp.*, 477 F.2d 542 (1973) (adopting 355 F. Supp. 902 (E.D. Mich. 1972)), as establishing that the pass-on defense is valid where "circumstances are such that proof that any overcharged [direct purchasers] * * * have not been damaged is easy to prove." 89-56 Pet. App. 32a, 33a.

The court found those circumstances to exist in the structure of contractual relationships among Detroit, the counties, and the municipalities. In an earlier case where Oakland County had sued a municipality for sewer payments, the Sixth Circuit had found that "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligations to Detroit," and that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities * * * to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for." *County of Oakland* v. *City of Berkley*, 742 F.2d 289, 292, 296 (6th Cir.1984). Relying on those statements in *Berkley*, the

[2] The record consists of the pleadings and one affidavit.

district court found that the counties sustained no injury because they were only intermediaries and, in effect, were not buyers but only collection agencies. 89-56 Pet. App. 34a.[3] Therefore, the court held, the counties had not alleged the injury in fact constitutionally required for standing.

The court also concluded that an exception to *Hanover Shoe* would be appropriate, because there was no problem of tracing the overcharges to the municipalities and the municipalities would have ample incentive to sue. 89-56 Pet. App. 34a-35a.[4] It further concluded that under *Associated General Contractors* v. *State Council of Carpenters*, 459 U.S. 519 (1983), the counties were not proper antitrust plaintiffs, primarily because they had suffered no injury. 89-56 Pet. App. 36a. In a subsequent order denying a motion to alter judgment, the court noted that the arrangements in this case are "[i]n essence" a pre-existing cost plus contract, 89-56 Pet. App. 43a, and therefore within the cost plus exception to the rule of *Hanover Shoe*.

Finally, the court held that the counties lacked standing under RICO, which provides remedies to anyone "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c). The court reasoned that the counties were mere conduits and thus were not injured.

3. A unanimous panel of the Sixth Circuit reversed, holding that the counties had both constitutional and statutory standing. It first rejected the district court's suggestion that the counties were not really buyers, but only agents of the municipalities. The court of appeals noted that Detroit had entered into contracts with Oakland, not the

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[3] The counties are also end users, paying the municipalities for sewage disposal services, but the court found that the counties had not sued in that capacity. 89-56 Pet. App. 42a.

[4] The court treated the municipalities as consumers, although they in turn passed overcharges along to other consumers.

municipalities, and that there was no showing that Detroit was entitled to look to the municipalities for payment. 89-56 Pet. App. 9a.

The court of appeals assumed for purposes of its decision that "any and all overcharges were passed on to the counties' own customers, the municipalities." 89-56 Pet. App. 11a. The court nevertheless found constitutional standing because, under applicable precedent, "[a] buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury," and standing is not lost merely because the overcharge is passed on. 89-56 Pet. App. 12a. Relying on *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the court found that the counties had alleged injury in fact, because the counties were liable for the overcharge, whether or not the municipalities paid. 89-56 Pet App. 13a-14a. Moreover, the higher cost of sewage services to the end user would hamper the counties in their competition with other counties for residents and businesses.[5] Thus, "[i]t would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and [one] * * * affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

The court of appeals also found antitrust injury and standing. It read *Hanover Shoe* and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), not as establishing exceptions to the indirect purchaser rule, but only as suggesting that an exception might exist. 89-56 Pet. App. 20a.[6] It also held that a cost-plus exception would not preclude the counties from suing, because permitting the municipalities and/or

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[5] The counties had not alleged this precise injury, but had generally alleged that they were injured in their business or property.

[6] The court of appeals said that *Illinois Brick* had "implicitly repudiated" its prior decision in *Obron*, on which the district court had relied. 89-56 Pet. App. 19a, 20a.

the end users to sue would introduce "precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid." 89-56 Pet. App. 21a.[7] The court found that its conclusion was "strongly confirmed" by the *Associated General* factors, all of which, it concluded, supported standing for the counties. 89-56 Pet. App. 22a-25a.[8]

Finally, the court, noting that the treble damage provision of RICO was "patterned directly on § 4 of the Clayton Act," 89-56 Pet. App. 25a, concluded that most of its antitrust standing analysis applied to RICO standing as well: "If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations." 89-56 Pet. App. 25a.

On rehearing, the court noted that *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S. Ct. 543 (1988), had recently recognized an exception to *Hanover Shoe* and *Illinois Brick* in the context of a pass-on required by state regulation, notwithstanding the absence of a fixed quantity guarantee. The court nevertheless declined to follow the Seventh Circuit's decision, reasoning that *Illinois Brick* had limited the possible cost plus exception to "contracts for a fixed quantity." 89-56 Pet. App. 27a-28a.

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[7] The court noted that there were multiple middlemen, that municipalities attempted to pass the overcharge on to end users, and that at best the pass on approach would lead to a massive class action in which ascertaining individuals' damages would be complex and difficult. 89-56 Pet. App. 21a-22a.

[8] The panel's rejection of the district court's conclusions on this point follow directly from its holding, contrary to that of the district court, that the counties properly alleged injury from an antitrust violation.

DISCUSSION

1. The central issue in this case, the proper scope of any cost-plus exception to the pass-on rule of *Hanover Shoe* and *Illinois Brick*, is an important question that has created considerable confusion in the lower courts. Petitioners contend that their use of a pass-on defense falls within the cost-plus exception to the rule of *Hanover Shoe* and *Illinois Brick*, even though there is in this case no preexisting cost-plus contract for a fixed quantity. *E.g.*, 89-56 Pet. 17. Assuming there is a cost-plus contract here,[9] this case presents the issue of the scope of the cost-plus exception.

Nevertheless, because of the unusual facts and the undeveloped state of the record, we believe that this case presents a less favorable context in which to resolve this issue than another case pending before this Court, *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.*, petition for cert. pending, No. 88-2109. First, the record here, consisting primarily of a single affidavit, provides minimal illumination of the factual context. Thus, the Court would be required to consider the question essentially in the abstract. It is unclear from the record, for example, whether either contract or statute requires the counties to pass on to the municipalities the full amount of any cost increases. It is also unclear how the counties' costs of administering the sewage system are passed on to the municipalities. Consequently, it cannot be determined whether an increase in Detroit's charges to the counties might lead the counties to absorb a higher proportion of those administrative costs. And it is unclear whether, in the event the counties do not

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[9] As we note, pp. 7-8 & note 10, *infra*, it is not clear that there is any legal requirement that the counties pass on cost increases to the municipalities.

pay Detroit's charges in full, Detroit is entitled to look to any county assets other than the enterprise funds.[10]

Second, under one plausible reading of the facts here, the issue presented may be narrower and of more limited applicability than the issue presented in *Kansas*. As we note in our brief in *Kansas*, much of the confusion in the lower courts concerns the significance of the "fixed quantity" requirement in this Court's formulation of the cost plus exception. In the absence of a fixed quantity provision, a direct purchaser may suffer lost profits because its customers purchase fewer of its products if it raises the price to reflect the overcharge. However, the record suggests that Michigan law and the terms of the contracts may insulate the counties from any such injury from lost profits as a result of reduced sales of sewage services. Viewing the record in this way, the Court might be able to decide the case on a ground of limited significance beyond the confines of this case. On the other hand, clarification of the cost plus exception in the context of the *Kansas* case is likely to resolve the issues in this case (to the extent they do not depend on facts not of record). Accordingly, we urge the Court to grant the petition in the *Kansas* case, and respectfully suggest that the Court defer acting on the petitions here pending disposition of that case.

2. In our view, neither the RICO issue nor the constitutional issue presented in the petitions warrants review. With respect to RICO, the court of appeals and the district court concluded that the proper analysis was essentially identical to that required under the Clayton Act. We know of no decision of any court reaching a contrary holding. Moreover,

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[10] We note that the court below pointed to the incomplete state of the record in refusing to hold that "the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

it seems plain that the court of appeals would have reached a different result had it concluded that respondents lacked standing under the Clayton Act. There is thus no reason for the Court to decide the RICO standing question now.

The question of constitutional standing also does not warrant review by this Court. If respondents have properly alleged injury to their business or property under the Clayton Act, RICO, or both, it seems plain that they have properly alleged injury for purposes of Article III. If they have not properly alleged injury under either the Clayton Act or RICO, it does not matter whether they have properly alleged injury for the purposes of Article III, since they claim no cause of action other than under the Clayton Act and RICO.

CONCLUSION

This Court should hold the petition for certiorari pending its disposition of *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.* No. 88-2109.

Respectfully submitted.

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